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In the Supreme Court of the United States

OCTOBER TERM, 1977

HAROLD EKMANIAN and B & H INGLEWOOD TOW, A CORPORATION, PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*, does not apply to their towing operations because, they assert, the towing operations are local in character and thus not "in commerce" within the meaning of the Act.

The Secretary of Labor commenced this action to enforce the overtime and recordkeeping provisions of Sections 7 and 11 of the Act, 29 U.S.C. 207 and 211. Testimony before the district court indicated that petitioners' employees accepted calls to tow or repair vehicles on freeways carrying interstate traffic, and that each employee would respond to freeway calls approximately five times weekly (Pet. App. B-3). The

district court held that petitioners' employees were engaged in interstate commerce and that petitioners had violated the Act (Pet. App. B-5 to B-7). The court of appeals affirmed the determination of coverage, but it remanded for a recomputation of the amounts of back wages due to the employees (Pet. App. A).

1. Petitioner's trucks and crews regularly provide "assistance to and towing of disabled vehicles from freeways, highways, streets and roads" in Los Angeles (Pet. App. B-2). They thereby keep the interstate roads clear of obstructions and facilitate the free passage of interstate travel. The activities of petitioners' employees in keeping the channels of interstate commerce clear of obstructions are "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' " *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 130.

Following *Overstreet*, which held that the Act applies to employees of a company engaged in maintaining a drawbridge that, unless properly serviced, would obstruct interstate transportation, numerous lower courts have applied the Act to employees of towing and wrecker services, such as petitioners', that help "maintain the road free from obstruction." *Crook* v. *Bryant*, 265 F. 2d 541, 543 (C.A. 4); *Gray* v. *Swanney-McDonald, Inc.*, 436 F. 2d 652 (C.A. 9), certiorari denied, 402 U.S. 995; *Brennan* v. *Keyser*, 507 F. 2d 472 (C.A. 9), certiorari denied *sub nom. Keyser* v. *Dunlop*, 420 U.S. 1004; *Hodgson* v. *Baker*, 544 F. 2d 429 (C.A. 9), certiorari denied *sub nom. Baker* v. *Marshall*, 430 U.S. 946. No court of appeals has held that employees of towing companies are not covered by the Act.[1] There is no conflict among the circuits on this

[1]See also *Snelling* v. *O.K. Service Garage, Inc.*, 311 F. Supp. 842 (E.D. Ky.). For the reasons discussed in the text, the Act also has been held applicable to companies engaged in dredging navigable waters (*Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C.A. 9)); repairing, maintaining and lighting streets and runways at a military base (*Writz* v. *B. B. Saxon Co.*, 365 F. 2d 457, 460, 462 (C.A. 5); *Writz* v. *R. E. Lee Electric Co.*, 339 F. 2d 686 (C.A. 4)); and providing ambulance service for victims of accidents on interstate highways (*Duffy* v. *Oele*, 274 F. Supp. 307 (W.D. Mich.); *Wirtz* v. *A-1 Ambulance Service, Inc.*, 299 F. Supp. 197 (E.D. Ark.); *Kelly* v. *Ballard*, 298 F. Supp. 1301 (S.D. Cal.)).

issue. Last spring the Court declined to review *Baker*, an almost identical case, and there is no greater reason to grant review of the present case.[2]

Petitioners contend (Pet. 21-23) that the decision of the court of appeals is at odds with the Act and the decisions

[2]Petitioners rely (Pet. 20, 23-24) on *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, and (by implication) *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, for the proposition that the "commerce" requirement in the Act should be construed to avoid applying it to local enterprises. But *Gulf* and *American Building* involved the Robinson-Patman Act and the Clayton Act, statutes with meanings and histories quite distinct from that of the Fair Labor Standards Act. The Court distinguished the Fair Labor Standards Act in both cases (*Gulf, supra*, 419 U.S. at 196; *American Building, supra*, 422 U.S. at 277), pointing out that "we are concerned in this case with significantly different statutes." Neither case supports the view that commerce requirements usually should be construed to exclude businesses like petitioners'. See *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738; *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773. The Fair Labor Standards Act has been construed by this Court "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; *Overstreet* v. *North Shore Corp., supra*, 318 U.S. at 128. The acts of petitioners' employees are in interstate commerce, and the Fair Labor Standards Act therefore applies. Cf. *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 255 (local restauranteur serving travelers has an effect on interstate commerce).

These cases also answer petitioners' contention (Pet. 24) that the Tenth Amendment precludes application of the Act to the towing business. See *Gulf, supra*, 419 U.S. at 196-197; *Wickard* v. *Filburn*, 317 U.S. 111, 127-128.

of other courts because it focuses on the activities of the employer rather than the activities of the employees. This is incorrect. The court of appeals did not hold that the Act applies to the drivers because petitioners are engaged in commerce; it held, instead, that the drivers are engaged in commerce. Whether any of petitioners' employees other than their drivers would be covered by the Act is not presented by the present case.

2. It is not clear why petitioners complain (Pet. 25) that the district court's order does not expressly authorize them to credit themselves with the amounts they are required to pay as income tax withholdings and the like. It always has been clear that an employer may credit itself with such payments out of wages that are required by law to be paid to its employees. The Department of Labor uniformly accepts such payments by the employer as satisfaction of the obligation under a back pay order, and the Department will do so in the present case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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